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FILED

JUN 10 2005

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

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5	In re) Case No. 04-33611-C-7
6	ALFRED M. CHITTEDEN and) DC No. JMS-1
7	JULIA H. CHITTENDEN) DC NO. MBB-1
8	In re) Case No. 04-33609-C-7
9	JONATHAN R. MCLAREN and) DC No. PDM-1
10	CYNTHIA M. MCLAREN)
11	In re) Case No. 04-34629-C-7
12	DAVID B. PETERSEN and) DC No. PDM-1
13	VICKI G. PETERSEN)
14	In re) Case No. 05-20025-C-7
15	CLARE F. PRICE) DC No. JMS-1
16) DC No. RSS-1
17	In re) Case No. 05-20678-C-7
18	WILLIAM P. CAMPBELL and) MC No. PDM-1
19	MARGENE T. CAMPBELL)
20	In re) Case No. 05-21288-C-7 ✓
21	DAVID T. LLOYD and) DC No. PPR-60
22	DIANE M. LLOYD)
23	In re) Case No. 05-21924-C-7
24	GLEND A BIANCO) DC No. MBB-1
25	In re) Case No. 05-22372-C-7
26	MONTE LEE BEACH, II and) MC No. JMS-1
27	MAUREEN A. BEACH)
28	In re) Case No. 05-20584-C-7
29	WILLIAM J. LONG) DC No. PDM-1
30	In re) Case No. 05-21097-C-7
31	JOHN E. MARK and) DC No. LJB-1
32	SHARON R. MARK)
33	In re) Case No. 05-22037-C-7
34	JOHN R. FRESK and) DC No. MBB-1
35	MIRIAM K. FRESK,)
36	DEBTOR(S).)

MEMORANDUM DECISION ON REQUESTS FOR ATTORNEYS' FEES AND COSTS

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1
2 These consolidated motions for relief from automatic
3 stay, which have been the subject of several oral proceedings
4 before this court, present a common pattern that may add up to
5 a below-the-radar abuse of the bankruptcy system.
6

7 In each instance, an oversecured mortgage creditor has
8 filed a stay relief motion in a chapter 7 case to be heard
9 within a short period before the stay would otherwise expire as
10 a matter of law (and in some instances after the stay expired
11 in part) and has asked the court to determine appropriate fees
12 to be charged pursuant to the terms of the contract. Hence,
13 the motions are of dubious necessity.

14 These unnecessary motions have been criticized as a
15 form of churning that has the primary effect of increasing the
16 amount of the debt by the \$750 - \$1500 that the creditor would
17 add to the debt, and take from a debtor's equity, under the
18 terms of its underlying contract without materially enhancing
19 the creditor's latitude.

20 The basic problem stems from the following provisions
21 of the Bankruptcy Code. First, the automatic stay expires with
22 respect to the interests of an individual chapter 7 debtor when
23 the debtor receives a discharge. 11 U.S.C. § 362(c)(2)(C).
24 Second, to the extent that the trustee has an interest in the
25 debtor's exempt property (ordinarily because it might have
26 realizable value in excess of the exemption), the automatic
27 stay expires as a matter of law when the residence is no longer
28 property of the estate. 11 U.S.C. § 362(c)(1). In the garden-
variety chapter 7 case, the debtor's residence ceases to be

1 property of the estate when the case is closed, in light of the
2 provisions that property not otherwise administered at the time
3 of closing is abandoned to the debtor at closing. 11 U.S.C. §
4 554(c).

5 The median chapter 7 case in the United States is
6 closed in fewer than 120 days after it was filed, according to
7 statistics published by the Administrative Office of the United
8 States Courts for calendar year 2004. In the Eastern District
9 of California, the median time for closing a chapter 7 case
10 during 2004 according to those same statistics was 103 days.

11 Unless there are assets to administer or pending
12 adversary proceedings or pending motions for relief from stay,
13 there is little reason why a chapter 7 case would remain open
14 longer than the median time.

15 The consequence of all this is that a creditor on a
16 residential home mortgage of an individual debtor will cease to
17 be effected by the automatic stay in the typical case, in
18 approximately 103 days after the case is filed in the Eastern
19 District of California and 120 days nationally.

20 Further, if the trustee files a "no asset report" after
21 the meeting of creditors, then the case is likely to be closed
22 expeditiously. Adversary proceedings are filed in fewer than 5
23 percent of all chapter 7 cases in this district.

24 The salient common characteristics of these motions is
25 that the debtor, in each instance, has equity in the property.
26 In other words, the value of the property exceeds the amount of
27 the debt but is less than an amount large enough to attract the
28 interest of the trustee in selling the residence so as to

1 realize value for the estate.

2 The economic consequence of the motion is that the
3 creditors, who contend that they are entitled to have their
4 fees and expenses reimbursed pursuant to the terms of the
5 contract, concede that they will add \$750 to \$1500 to the
6 amount of the debt that must be paid by the debtors. Thus, to
7 the extent that a debtor may be in default on a home mortgage,
8 the amount later required to cure it is being inflated by the
9 expenses of the motion.

10 In addition to the attorney's fee expense, each of
11 these motions was subject to a filing fee in the amount of
12 \$150. 28 U.S.C. § 1930, Bankruptcy Court Miscellaneous Fee
13 Schedule, #20.

14 In most of these instances, the movant did not, before
15 filing the motion, contact the trustee to see if the trustee
16 would stipulate to relief from stay. The significance of this
17 is that no filing fee is required for a stipulation for court
18 approval of an agreement for relief from stay. Id.

19 It follows that, when a creditor files a motion for
20 relief from stay against the debtor who has exempt equity in
21 their residence, which motion is to be heard at or near the
22 time the debtor receives a discharge, the motion is likely to
23 be mooted as to the debtor because of the expiration of the
24 stay soon after the motion could be heard in the first place.
25 Moreover, by not contacting the trustee in search of a
26 stipulation, the creditor automatically inflicts a \$150 filing
27 fee on the debtor.

28 While some of the creditors argued in the several oral

1 hearings on these consolidated motions that trustees will not
2 stipulate for relief from stay, it is apparent to this court
3 (and as confirmed by concessions by other parties during the
4 hearings) that chapter 7 trustees in this district commonly do
5 stipulate to relief from stay. The problem is that the
6 creditors rarely bother to ask.

7 It follows that these motions for relief from stay,
8 even though permitted by law, should not have been necessary.
9 They serve little useful purpose, clog a court's calendar, and
10 increase a debtor's burden of secured debt. Hence, no
11 attorney's fees are reasonable nor should costs be awarded or
12 permitted to be reimbursed under the terms in the contract.

13 The law in the Ninth Circuit is that attorney's fees
14 for relief from stay litigation are not available under the
15 terms of the Bankruptcy Code. Johnson v. Righetti (In re
Johnson), 756 F.2d 738, 741 (9th Cir. 1985).

16 The Johnson v. Righetti decision has also been
17 understood to mean that the expenses of a motion for relief
18 from stay do not constitute an "action on the contract" that is
19 subject to the terms of California Civil Code § 1717, which
20 provides, in relevant part:

21 Where a contract provides for attorney's fees, . . . ,
22 that provision shall be construed as applying to the
23 entire contract, unless each party was represented by
24 counsel in the negotiation and execution of the
25 contract, and the fact of that representation is
specified in the contract.

26 Reasonable attorney's fees shall be fixed by the court,
27 and shall be an element of the costs of suit.

Cal. Civ. Code § 1717.

Thus, debtors as prevailing parties have been prevented

1 from seeking to exploit the terms of § 1717. See, e.g., Hassen
2 Imports Partnership v. KWP Financial VI (In re Hassen Imports
3 Partnership), 256 B.R. 916, 921-23 (9th Cir. BAP 2000).

4 The twist in this case is that in each instance the
5 court was asked by the movant in the motion to determine fees.
6 Since the only possible basis for the court awarding fees would
7 be under applicable nonbankruptcy law, i.e., the contract
8 subject to § 1717, it appears that by invoking § 1717 the
9 creditors have, in effect, waived their right to resist an
10 award in favor of a debtor under § 1717 and have conceded that
11 they are proceeding as if the motion for relief from stay is an
12 action on the contract.

13 This view is supported by the concession by all of the
14 creditors during the several oral hearings in these
15 consolidated motions that the creditors systematically add
16 expenses under the terms of the contract, which are subject to
17 § 1717, regardless of whether the court makes an award.

18 Paradoxically, this amounts to the creditors
19 systematically conceding that Johnson v. Righetti was decided
20 on the false premise that creditors were not routinely adding
21 fees and expenses of automatic stay litigation to the debt
22 pursuant to the terms of the contract. The numerous creditors
23 involved in this litigation have demonstrated the fallacy in
24 Johnson v. Righetti.

25 Even though the creditors have contended that they are
26 only animated by the purest of motives, one cannot help but
27 note that by filing a motion for relief from stay where the
28 debtor has exempt equity in a residence and a comparatively

1 minor default (as is the case in most of these motions) the
2 economic consequence is that the creditors appropriate to
3 themselves (and their counsel) a bankruptcy tax to be paid by
4 the debtors from their exemption that supposedly is being
5 protected by the bankruptcy.

6 Thus, viewed from a macro level, the practice
7 identified in these motions raises difficult questions that
8 suggest an abusive practice.

9 For the foregoing reasons, each of the motions for a
10 determination of fees and costs will be denied, and it is
11 specifically determined that the reasonable fees and expenses
12 in connection with this motion are zero within the meaning of §
13 1717, which the movants have asked this court to apply by
14 virtue of their request for fees and expenses. Similarly, all
15 costs are denied because the motions were unnecessary. In
16 addition, as a separate, independent reason to deny costs for
17 filing of the motions, the creditors did not ask the trustee to
18 stipulate for relief from the stay such that the \$150 filing
19 fee would not be required to have been paid in the first place.

20 Appropriate orders will issue.

21 Dated: June 10, 2005.
22

23 
UNITED STATES BANKRUPTCY JUDGE
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2 **CERTIFICATE OF SERVICE**
3

4 On the date indicated below, I served a true and correct
5 copy(ies) of the attached document by placing said copy(ies) in
6 a postage paid envelope addressed to the person(s) hereinafter
7 listed and by depositing said envelope in the United States
8 mail or by placing said copy(ies) into an interoffice delivery
9 receptacle located in the Clerk's Office.

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26 Dated: 6-14-05


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